M. J. Metal Products, Inc. *and* Sheet Metal Workers International Association, Local Union #207. Cases 27–CA–15523, 27–CA–15549, 27–CA–15619, and 27–RC–7813

August 10, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On August 26, 1998, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The Respondent has excepted to the judge's recommendation that a *Gissel*[3] bargaining order be issued. It asserts that this remedy "would be inappropriate, would not effectuate the purposes of the Act, and is not justified by the record." We find no merit in the Respondent's arguments.

In *Gissel*, the Supreme Court "identified two types of employer misconduct that may warrant the imposition of a bargaining order: 'outrageous and pervasive unfair labor practices' ('category I') and 'less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes' ('category II')."[4] The Supreme Court stated that in fashioning a remedy in the exercise of its discretion in category II cases, the Board "can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue."[5]

In agreeing with the judge that a *Gissel* bargaining order should be issued, we find, for the reasons set forth below, that the Respondent's course of misconduct, both before and after the election, clearly demonstrates that the holding of a fair election in the future would be unlikely and that the "employees' wishes are better gauged by an old card majority than by a new election."[6]

Because this case falls within category II, we have, as mandated by the Supreme Court in *Gissel*, examined the extensiveness of the Respondent's unfair labor practices and the likelihood of their recurrence in the future. In this regard, we observe that the unfair labor practices committed in this case include "hallmark" violations such as the discharge of 4 union supporters in a unit of about 15 employees, more than 25 percent of the unit employees, as well as threats to sell the business and shut down operations if the Union were selected.[7] The Respondent also committed numerous other serious and pervasive unfair labor practices: retaliating against unit employees for their union activity by changing their work schedules, requiring them to bring doctors' slips when they are absent and to document repairs to products, and refusing to give them previously approved time off for personal business; interrogating its employees regarding their union activities or the union activities of other employees; threatening to demote employees to apprentice positions and hire journeymen sheet metal workers if employees select the Union to represent them; telling unit employees that this company would never be union; suggesting to employees that their concerns be resolved through "arbitration" in an effort to cause them to discontinue their union activities; and failing to observe the *Johnnie's Poultry*[8] safeguards when the Re-

[1] Absent specific exceptions, we adopt the judge's findings that the Respondent violated the Act and engaged in objectionable conduct by threatening to sell the business and shut down operations if the Union were selected; retaliating against unit employees for their union activity by changing their work schedules, requiring them to bring doctors' slips when they are absent and to document repairs to products, and refusing to give them previously approved time off for personal business; interrogating employees regarding their union activities or the union activities of other employees; threatening to demote employees to apprentice positions and hire journeymen sheet metal workers if employees select the Union to represent them; telling unit employees that the company would never be union; and suggesting to employees that their concerns be resolved through "arbitration" in an effort to cause them to discontinue their union activities. We also adopt, absent specific exceptions, the judge's findings that the Respondent violated the Act by interviewing employees in preparation for the unfair labor practice proceeding without appropriate safeguards, and by the discharge of Jay Newcombe and Brian Johnson.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997), and to conform to the violations found.

[3] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

[4] *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996) (quoting *Gissel*, 395 U.S. at 613–614).

[5] 395 U.S. at 614–615.

[6] *Charlotte Amphitheater Corp. v. NLRB*, supra, 82 F.3d at 1078.

[7] The term "hallmark violations" has been used to describe unfair labor practices that are highly coercive and have a lasting effect on election conditions. See *NLRB v. Jamaica Towing,* 632 F.2d 208, 212–213 (2d Cir. 1980).

[8] 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1979).

spondent's attorney interviewed employees in connection with this case.

The coercive effect of the Respondent's misconduct cannot be denied. These serious violations, which directly affected the entire unit, began the day after the Union requested recognition and continued even after the election. In this relatively small unit of approximately 15 employees, the Respondent unlawfully discharged two union supporters 3 days after the Union requested recognition, and discharged two more about 2 months later, 3 days after the election. This conduct "goes to the very heart of the Act" and is not likely to be forgotten. *NLRB v. Entwistle Mfg. Co*., 120 F.2d 532, 536 (4th Cir. 1941). "Such action can only serve to reinforce employees' fear that they will lose employment if they persist in union activity." *Consec Security*, 325 NLRB 453, 454 (1998). The impact of this action was magnified by its proximity to the Union's demand for recognition, the filing of the representation petition, and the election. Id. This conduct by the Respondent sent employees "the unequivocal message that it was willing to go to extraordinary lengths in order to extinguish the union organizational effort." Id. It is reasonable to infer that such a message will have a lasting effect on the unit employees' exercise of their right to organize. Id.

The severity of the misconduct is compounded by the involvement of high-ranking officials. Id, slip op. at 3. The Respondent's unfair labor practices emanated from the highest level officials, with many attributable to the company president and owner himself. The company owner told employees, inter alia, that the company would never be union, threatened that if the employees wanted to go union he would hire journeymen and that current employees would be apprentices, and has proclaimed that, "Well, now that this union crap is behind us, things are going to start changing. . . ." As the Board has observed, "[w]hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten." Id.[9]

Although the discharged employees are entitled to reinstatement and backpay, these remedies would not, in our view, erase the coercive effects of the Respondent's conduct. The reinstated employees would not likely risk again incurring the Respondent's wrath and another period of unemployment by resuming their union activities.

Particularly telling in this regard is the Respondent's unlawful treatment of employee Brian Johnson, which was widely disseminated among the unit employees. As detailed in the judge's decision, on the day following the Union's demand for recognition, the Respondent's president and owner, Mark Johnston, changed Johnson's work schedule in a manner designed to interfere with his ability to provide care for his seriously ill son. When Johnson questioned why this was being done to him, Johnston replied to the effect, "You guys know why." And when Johnson asked how long the new shift change would be in effect, Johnston said, "Forever."[10]

As noted, the Respondent's misconduct continued even after the election, when the Respondent discharged two union supporters and disregarded employee rights by failing to observe the *Johnnie's Poultry* safeguards during the preparation for this proceeding. An employer's continuing hostility toward employee rights in its postelection conduct "evidences a strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort." *Garney Morris, Inc.,* 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995).

In this case, there is no claim that a *Gissel* order is not warranted because of the passage of time between the *Gissel* order and the unfair labor practices which justified it, or because of the intervening turnover of employees and management. These issues which have concerned some courts in denying enforcement of our *Gissel* orders[11] are simply not present. There has been a relatively short time period between the unfair labor practices and the issuance of this Order, and there is no evidence of any substantial turnover of management or employees, other than that caused by the Respondent's unlawful discharge of four union supporters.[12] Indeed, the Respondent does not even argue that changed circumstances preclude the issuance of a bargaining order.[13]

[9] See also *Electro-Voice*, 320 NLRB 1094, 1096 (1996); *America's Best Quality Coatings Corp*., 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 515 U.S 1158 (1995).

[10] The Respondent does not contest the judge's finding that the abrupt change in Johnson's work schedule violated Sec. 8(a)(3) of the Act.

[11] For example, the District of Columbia Circuit has stated that to justify the imposition of a *Gissel* bargaining order, the Board must

> find that a bargaining order is necessary *at the time it is issued* and support its finding with a "reasoned explanation that will enable the reviewing court to determine from the Board's opinion (1) that it gave due consideration to the employees' section 7 rights, which are, after all, one of the fundamental purposes of the Act, (2) why it concluded that other purposes must override the rights of the employees to choose their bargaining representatives and (3) why other remedies, less destructive of employees' rights, are not adequate."

Flamingo Hilton-Laughlin v. NLRB, 148 F.3d 1166, 1173 (D.C. Cir. 1998) (emphasis in original), quoting *NLRB v. Charlotte Amphitheater,* supra, 82 F.3d at 1078 (citations omitted).

[12] "It would defy reason to permit an employer to deflect a *Gissel* bargaining order on the ground of employee turnover when that turnover has resulted from the employer's unlawful discharge[s]. . . ." *NLRB v. Balsam Village Management Co*., 792 F.2d 29, 34 (2d Cir. 1986).

[13] The District of Columbia Circuit made clear in *Charlotte Amphitheater* that the burden is on a respondent to bring to the Board's attention evidence of changed circumstances that would mitigate the need for a bargaining order. Thus, the court stated that before issuing a bargaining order, "the Board has no affirmative duty to inquire whether employee turnover or the passage of time has attenuated the effects of earlier unfair labor practices." 82 F.3d at 1080.

In addition, the Respondent has presented no evidence or argument that would lead us to believe that it is now prepared to allow the employees to freely exercise their Section 7 rights. To the contrary, the Respondent's conduct indicates to us that there is reasonable likelihood that the Respondent will continue to thwart employee rights in the future. Thus, even though the Respondent did not except to most of the unfair labor practices and objectionable conduct found by the judge, thereby effectively conceding that it engaged in such conduct, it nevertheless continues to contest the propriety of even holding a second election. It argues in its exceptions that conducting a second election "would be inappropriate, would not effectuate the purposes of the Act, and is not justified by the record." Further, there is no evidence or even argument that the Respondent has attempted to reinstate or make whole the two employees whose discharges it no longer contests, or to otherwise remedy the misconduct which it concedes.[14] These circumstances lead us to doubt that the Respondent would conform its conduct to the requirements of the law and permit a fair election to be held.

In concluding that a *Gissel* order is warranted, as required by some circuit courts we have examined its appropriateness under the circumstances existing at the present time and we have considered the inadequacy of other remedies. See, e.g., *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d at 1173. Further, as discussed below, we have given due consideration to the employees' Section 7 rights, another concern expressed by some courts.[15]

In *Gissel*, the Supreme Court rejected the argument advanced by the employers that a bargaining order is a punitive remedy that "needlessly prejudices employees' Section 7 rights." 395 U.S. at 612. The Court stated that a bargaining order not only deters "future misconduct," but also remedies "past election damage." Id. The Court reasoned as follows:

> If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.[33] There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. For, as we have pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." [395 U.S. at 612–613 (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705–706 (1944).]

[33] It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election, and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. [citation omitted.] Any effect will be minimal at best, however, for there "is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv.L.Rev. 38, 135 (1964).

This passage clearly shows that in approving the Board's use of the bargaining order remedy in Category I and II cases, the *Gissel* Court explicitly took into account the rights of employees who both favored and opposed union representation. The Court stated that if an employer's unfair labor practices have the tendency to undermine a union's majority strength and destroy election conditions, then "the only fair way to effectuate employee rights" is to issue a bargaining order.[16] In these circumstances, the interests of the employees favoring unionization are safeguarded by the bargaining order. The interests of those opposing the union are adequately safeguarded by their right to file a decertification petition at an appropriate time pursuant to Section 9(c)(1) of the Act. On the other hand, if the facts of a case fall within Category III, i.e., the employer committed only "minor or less extensive unfair labor practices" with only a "minimal impact on the election machinery," then a bargaining order may not issue, notwithstanding the fact that a majority of employees signed authorization cards in support of the union. 395 U.S. at 615.

In sum, the *Gissel* opinion itself reflects a careful balancing of the employees' Section 7 rights "to bargain collectively" and "to refrain from" such activity. Therefore, if a bargaining order has been adequately justified

[14] Cf. *Charlotte Amphitheater,* supra, 82 F.3d at 1080 (the employer argued that 13 of the 20 discriminatees had been placed on its active work roster; the court held that this was evidence of changed circumstances that might mitigate the need for a bargaining order).

[15] See fn. 11, supra.

[16] Fifteen years earlier, the Court observed in *Brooks v. NLRB*, 348 U.S. 96, 103 (1954), that the Act placed "a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers." Thus, the statute itself subordinates the rights of the minority to those of the majority. See Sec. 9(a) of the Act.

under the *Gissel* standards, then we respectfully submit that due consideration has been given to the employees' Section 7 rights consistent with the concerns expressed by the District of Columbia Circuit.

Accordingly, for all these reasons, we agree with the judge that a *Gissel* bargaining order is an appropriate and necessary remedy in this case.[17]

ORDER

The National Labor Relations Board orders that the Respondent, M. J. Metal Products, Inc., Casper, Wyoming, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding their union activities or the union activities of other employees.

(b) Retaliating against its employees for their union activity by changing their work schedules, by requiring them to bring doctors' slips when they are absent, by requiring them to document repairs to products, and by refusing to give them previously approved time off for personal business.

(c) Threatening to demote employees to apprentice positions and hire journeymen sheet metal workers if employees select the Union to represent them.

(d) Interfering with employees' right to select a union by stating that the Company would never be union.

(e) Suggesting that employees' concerns be resolved through "arbitration" in an effort to cause them to discontinue their union activities.

(f) Threatening to sell the business and shut down its operations if it unionized.

(g) Discharging employees because of their interest in and activities on behalf of the Union.

(h) Conducting employee interviews regarding matters that are the subject of NLRB proceedings without advising employees that they may refuse to engage in such interviews and that there will be no reprisals for their cooperation or noncooperation with the Respondent's investigation of the matter.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jay Newcombe, Brian Johnson, Shannon Leedall, and Kelly Martin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jay Newcombe, Brian Johnson, Shannon Leedall, and Kelly Martin whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) On request, recognize and bargain with the Union as the exclusive collective bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and part-time employees, engaged in the fabrication, assembly, shipping and receiving, and installation of products produced at the Respondent's Casper, Wyoming facility; and excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Casper, Wyoming facility copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice

[17] However, we disagree with the judge's statement in his remedy section that the bargaining order is "provisional" and that it "shall become effective in the event a majority of ballots in the representation matter herein has not been cast for the Union." Under Board precedent, the Union is entitled to both a bargaining order and a certification of representative in the event the revised tally of ballots shows that it won the election. See *Gordonsville Industries*, 252 NLRB 563, 604 (1980), and the cases it cites. We shall modify the judge's recommended Order accordingly.

For the same reason, there is no merit in our dissenting colleague's position that the Board should reserve judgment on the *Gissel* bargaining order until after the election results are known. See the majority opinion in *General Fabrications Corp.*, 328 NLRB 1113, 1115 fn. 17 (1999).

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

to all current employees and former employees employed by the Respondent at any time since September 23, 1997.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 27–RC–7813 is remanded to the Regional Director for Region 27 with directions to open and count the ballot of Shannon Leedall and to serve on the parties a revised tally of ballots. If the majority of the ballots have been cast for the Union, the Regional Director shall issue the appropriate certification. If the majority of the ballots have not been cast in favor of the Union, the election shall be set aside and the representation case dismissed.

MEMBER HURTGEN, dissenting in part.

I would not now pass on the *Gissel* issue. There is at least a reasonable possibility that the Union has won the election, and that a second election will not be held. See my dissent in *General Fabrications Corp.*, 328 NLRB 1113 (1999).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you regarding your union activities or the union activities of other employees.

WE WILL NOT retaliate against you for your union activity by changing your work schedules, or by requiring you to bring doctors' slips when you are absent, or by requiring you to document repairs to products, or by refusing to give you previously approved time off for personal business.

WE WILL NOT threaten to demote you to apprentice positions and hire journeymen sheet metal workers if you select the Union to represent you.

WE WILL NOT interfere with your right to select a union as your collective-bargaining representative by stating that this Company will never be union.

WE WILL NOT suggest to you a means by which your concerns may be resolved through arbitration in an effort to cause you to discontinue your union activities.

WE WILL NOT threaten to sell the business and shut down its operations because of your union activity.

WE WILL NOT conduct employee interviews with you regarding matters that are the subject of NLRB proceedings without advising you that you may decline to engage in such interviews and that there will be no repercussions in the event that you cooperate or refuse to cooperate with our investigation of the matter.

WE WILL NOT discharge employees because of their interest in and activities on behalf of the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jay Newcombe, Brian Johnson, Shannon Leedall, and Kelly Martin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jay Newcombe, Brian Johnson, Shannon Leedall, and Kelly Martin whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Jay Newcombe, Brian Johnson, Shannon Leedall, and Kelly Martin and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, on request, recognize and bargain with Sheet Metal Workers International Association, Local Union #207 as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All full-time and part-time employees, engaged in the fabrication, assembly, shipping and receiving, and installation of products produced at our Casper, Wyoming facility; and excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

M. J. METAL PRODUCTS, INC.

Donald E. Chavez, Esq., for the General Counsel.
Bruce Willoughby, Esq. (Brown, Drew, Massey and Sullivan), of Casper, Wyoming, for the Respondent.
Dale Hill, Business Manager, of Casper, Wyoming, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge**.** Pursuant to notice a hearing in this matter was held before me in Casper,

Wyoming, on April 21 and 22, 1998. The charge in Case 27–CA–15523 was filed on September 24, 1997, by Sheet Metal Workers International Association, Local Union #207 (the Union). Thereafter, subsequent charges were filed by the Union on October 8 and December 4, 1997.

The petition in Case 27–RC–7813 was filed by the Union on September 26, 1997. Thereafter, a representation hearing was held on October 7, 1997. On October 28, 1997, the Regional Director for Region 27 of the National Labor Relations Board (the Board) issued a Decision and Direction of Election and an election was held on November 25, 1997. The tally of ballots reflects that of approximately 13 eligible voters, 6 cast ballots in favor of the Union, 6 cast ballots against the Union, and there was 1 challenged ballot which is sufficient in number to affect the results of the election. Thereafter the Union filed timely election objections.

On November 26,1997, the Regional Director issued an order consolidating cases, consolidated complaint and notice of hearing in Cases 27–CA–15523 and 27–CA–15549. On January 2, 1998, the Acting Regional Director issued a Supplemental Decision on Challenged Ballot and Objections to Election, Order Directing Hearing, Order of Consolidation, and Notice of Hearing, in which the unfair labor practice cases and the representation proceeding were consolidated for the purposes of hearing. The consolidated complaint alleges violations by M.J. Metal Products, Inc. (the Respondent) of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).[1] The Respondent, in its answer to the complaint, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel), and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with its office and place of business located in Casper, Wyoming, where it is engaged in the sheet metal business. In the course and conduct of its business operations the Respondent annually purchases and receives at its Wyoming facility goods, materials, and services valued in excess of $50,000 directly from places outside the State of Wyoming. It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issues raised by the pleadings are whether the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act by various alleged unlawful acts, including the discharge of four employees; and whether, under the circumstances herein, the Respondent's conduct warrants that the Respondent be required to bargain with the Union as the collective-bargaining representative of its employees, and has violated Section 8(a)(5) of the Act by instituting certain alleged unilateral changes without bargaining with the Union.

Further, in the related representation proceeding, the issues are whether the determinative challenged ballot of one of the alleged discriminatees should be counted and a revised tally of ballots issued, and, if a majority of the ballots has not been cast in favor of the Union, whether the election objections should be found to be meritorious and a new election conducted.

B. The Facts

The Respondent manufactures stainless steel food service equipment. Mark Johnston is president and owner; John Dykes is production manager.

On September 15 and 22, 1997,[2] the Respondent's employees attended union meetings and signed union cards authorizing the Union to represent them for purposes of collective bargaining. Thirteen of the Respondent's approximately 15 employees signed authorization cards. On September 22, Union Business Agent Dale Hill went to the Respondent's shop and spoke with Johnston. Hill testified that he informed Johnston that a majority of his employees had signed voluntary recognition cards authorizing the Union to represent them as their collective-bargaining agent for purposes of negotiating wages and working conditions. He presented Johnson with the following letter, dated September 22:

> Please be advised that Sheet Metal Workers' International Association, Local Union #207 represents a majority of your employees. We have obtained Authorization Cards from a majority of the employees employed by you in a Unit that is appropriate for purposes of collective bargaining.
>
> We are requesting immediate recognition of the Local Union as the Collective Bargaining Agent of your employees, for the purposes of negotiating an Agreement for wages, hours and working conditions.
>
> We are available to meet with representatives of your Company at a mutually convenient time and place, in order to negotiate and discuss the terms and conditions of a Collective Bargaining Agreement.
>
> In the event you have any doubt as to whether our Union represents a majority of your employees, we are willing to have an independent third party check our Authorization Cards, signed by your employees, against your personnel records.
>
> Your employees are protected under Section 7 of the National Labor Relations Act and guaranteed their right to form or assist in forming a union.
>
> We would appreciate your FAXED response by Wednesday, September 24, 1977 4:00 P.M. (FAX 234–8110).

Hill testified that the Respondent did not contact him thereafter, and that he had no further communications with the Respondent. Accordingly, the Respondent has not provided the Union an opportunity to negotiate regarding any mandatory subjects

[1] The complaint was amended at the hearing to include additional alleged violations of Sec. 8(a)(1) of the Act.

[2] All dates or time periods hereinafter are within 1997 unless otherwise specified.

of bargaining.[3] Thereupon, on September 26, the Union filed the representation petition in this matter.

Donald Stagg has been employed by the Respondent for 2 years. Stagg testified that he attended a union meeting at the union hall on September 22, and that on the following day, at work , Production Manager Dykes approached him and asked, "[H]ow did the meeting go last night.?" Stagg replied that it went okay, and Dykes asked him if he was thinking of joining the Union. Stagg replied that he didn't think that union matters were supposed to be discussed on company time, and Dykes said, "I think it's a mistake," and turned and walked away. Stagg testified that about 20 minutes after this conversation with Dykes, Office Manager Novella Marvel, an admitted supervisor, approached him in the shop and advised him that he had not clocked out the night before. She then asked him whether he had left early to go to the union meeting. Stagg merely replied that he thought he had clocked out, but it was possible that he had not.

Bardo Miller has been employed by the Respondent for 3 years. He is currently shop foreman,[4] but in September was a member of the unit herein and signed a union authorization card. Miller testified that on about September 23, Johnston mentioned something about the Union trying to get in, and told him that if the employees wanted to go union he would hire journeymen sheet metal workers and that the current employees would all become apprentices. Johnston also said, according to Miller, that he would never be union.

Miller testified that a day or so later Dykes asked him if he was going to join the Union. Miller said that he was thinking about it. Dykes said that he had thought about it at one time when he was coming up through the ranks, and decided against it. He asked Miller what benefits the employees believed they could get through the Union, and Miller replied that they might get a little more pay and better insurance and other benefits. Dykes said the employees were going to lose if they went Union.

Robert Tasler has been employed by the Respondent for about 4 years as a welder. Tasler testified that he attended a union meeting on the evening of September 22. On the following day, at work, Dykes approached him and asked him "how the big meeting went last night," and whether he was going to join the Union. Tasler, who had signed a union authorization card, was noncommittal and replied that that he didn't know yet.

Earl Anthony Sanchez was employed by the Respondent from April 24, 1995, until November 19, 1997. Sanchez testified that on September 17 he spoke with Johnston about having to attend a series of La Maze classes with his wife, and wanted to alter his schedule and leave work an hour early on the following day, September 18, and again on September 25. Johnston gave him permission to leave work early on both days, and said it should not be a problem.

On September 24, Sanchez , together with almost all of the shop employees, participated in union hat day. On that day, and thereafter, the shop employees wore hats bearing the union logo at work to demonstrate their support for the Union. Sanchez testified that Dykes came over to him as he was clocking in that day, pulled Sanchez' hat down and said, "nice hat." Later that day Sanchez, who was wearing his union hat, reminded Johnston about having to leave work an hour early the next day for the La Maze class, and asked if it was still okay to do so. Johnston, according to Sanchez, said no and told him that everybody was on a set schedule because that's the way everybody wanted it. Sanchez said fine. Sanchez testified that Dykes was present during this conversation.

Danny Ashley was employed by the Respondent from April 1991 until December 1997. He was a team leader. He wore a union hat on hat day and continued to wear it thereafter to show support for the Union. Ashley testified that shortly after hat day one of the Respondent's primary customers, Bill Britz, had attempted to phone him at home and had left word that Ashley and/or Jay Newcombe[5] should return his call as the matter was urgent. Several days later, Ashley returned Britz' phone call. Ashley testified as follows regarding his conversation with Britz:

> [Britz] said he was concerned about what was going on at the shop and whether it was going to affect his products getting to him, and that he wanted to know why we were starting a union. I told him that we were concerned about some of the other people's wages and the safety of the shop, and we wanted a change. So he went on about unions are bad, the unions out East were corrupt and they weren't any good for little companies, he believed that the unions were for just big companies at all [sic]. And he went on to say that his father was an independent contractor and he was an independent contractor, [and] he was just totally against unions.
>
> Then he went on to say that he wanted to be an arbitrator for Mark Johnston and myself, along with Jay Newcombe, to settle the differences between us. And I told him that he could not be an arbitrator because he had already given me his biased opinion against the union. So I said, thanks, but I cannot use you as an arbitrator.
>
> So we switched the subject to other things, and something about a strike. Oh, he said that if there was a strike that he would have to bring his people up from Wheatland to cross our picket line, and he said, things could get real ugly. And he didn't specify what he meant by that.
>
> He went on to say that he had talked to Mark [Johnston] sometime earlier and he had asked Mark who was the instigator in getting this union involved, and Mark had told him that Brian Johnson was the instigator along with Jay Newcombe and myself. And he said he could believe that Brian could be the instigator because Brian is a very boisterous person, he's very forward, and he said he could not believe that I was involved in such a thing.

William Britz was called as a witness by the General Counsel. Britz is the owner of a company that designs and builds animal enclosures, and has been a customer of the Respondent since 1994. He considers himself a personal friend of Mark Johnston. When Britz became aware of the union activity at the Respondent's facility he became concerned that it could affect his business. Britz testified that the Respondent is his "primary supplier and it means a lot to our company. Our company would be dead in the water without them." He asked

[3] It is alleged herein that the Respondent has violated the Act by making certain unilateral changes without providing the Union an opportunity to bargain over such matters.

[4] The record does not reflect whether this is considered to be a supervisory position.

[5] Both of these individuals could be reached through the same phone number of a mutual relative.

Johnston about the situation, and was told that a union organizer had visited Johnston, but that things would continue on as they had been and Britz should not be concerned about getting his orders filled. Thereafter, he called Johnston from time to time and asked him how the union situation was going. Johnston kept him updated about the representation hearing that was scheduled for October 7.

Britz testified that Danny Ashley, Brian Johnson, and Jay Newcombe were the key employees that Britz worked with in getting his orders manufactured at the Respondent's shop, and that his relationship with them was one of camaraderie. He asked Johnston if it was okay if he spoke with Ashley about the union matter, as he felt particularly close to Ashley. Johnston told him that he could do what he wanted, so long as it was understood that Johnston was not involved and had nothing to do with it.

Britz did talk to Ashley by phoning him at home on a Saturday. He testified that he got Ashley's home number from the information operator as he felt it would be inappropriate to obtain it from the Respondent. Ashley returned his call at some point, and Britz told him that this was a personal call and he felt they had a close relationship. He asked what the problem was at the shop. Ashley said that overtime was a problem, and that there were other problems. Britz suggested that he serve in some way as an arbitrator of these things, and, according to Britz, Ashley became upset and "just jumped right on me," and said there was no way he would have Britz be an arbitrator because Britz was Johnston's friend. Britz told Ashley that he had had problems with unions in the East, and at some point in the conversation, according to Britz, Ashley stated that things were going to get ugly and that the employees were going to go on strike and that they were going to form a picket line. Britz said that a strike would hurt his business too, and that if the employees formed a picket line he would be obliged to cross it and try to get his parts manufactured in order to survive, as he did something like a quarter of a million dollars worth of business with the Respondent. He said that he could not just stand by and let things happen, and that he wanted to be a part of the solution. Britz testified that he was "extremely shocked" by Ashley's negative response to what he believed was a reasonable suggestion regarding his offer to act as an arbitrator.

Thereafter, Britz informed Johnston about the conversation. Johnston, according to Britz, said that he didn't want to hear about it; however, he did not tell Britz to refrain from speaking to his employees about the matter. Britz testified that Johnston never requested him to speak to any of the employees on Johnston's behalf.

Ashley testified that he was absent from work on October 3 because of an asthma attack that was brought on by having assisted his brother-in-law, Jay Newcombe, haul hay the previous day. His wife called the Respondent for him and said that he would be absent that day. Shortly thereafter, at 8 a.m., Dykes showed up at his house (Ashley does not have a phone) and said that he was sent there to relay a message from Johnston: that if he wanted to return to work he would need a doctor's excuse. Ashley asked what brought that about, as a doctor's excuse had never been necessary in the past, and Dykes said that Johnston was starting to change a couple of things and was beginning to go by a "new book" that he had just obtained.

Jay Newcombe was employed by the Respondent for about 5-1/2, from April 1992 until November 27, 1997. He was a team leader and was responsible for training new employees. He attended all the union meetings, signed a union authorization card, and participated in hat day on September 24. He continued to wear the union cap every day thereafter until the day of his discharge, infra. Further, he testified on behalf of the Union in the representation hearing on October 7.[6] Shortly after September 22, the date the Union requested recognition, Newcombe was asked by Johnston to return the set of keys to the Respondent's premises that he often used to open the shop in the morning because, according to Johnston, thefts had been occurring.[7]

Newcombe was on the same pool team as Eric Risberg, the Respondent's salesman, and was a friend of Risberg. Newcombe testified that several days after hat day he happened to be at Risberg's home where the team would practice. Risberg handed him an envelope bearing the "MJ Metal" logo, and said that he had obtained it from Johnston's desk. He told Newcombe to go ahead and open it up and take a look at the documents inside. The envelope contained a number of bank statements showing that checks written by Johnston had been refused payment by the bank because of insufficient funds in the Respondent's account. Risberg went on to say how much the Union was going to hurt the Respondent. Further, he said that Johnston had received an offer from someone out of state to purchase the shop for a lot of money, that the person was intending to move the shop out of state and was only intending to keep key personnel, and that everybody else was going to be "fucked." Then Risberg ended the conversation by stating, "Well, that's enough about the union, let's go play some pool."

Eric Risberg was called as a witness by the Respondent. His title is equipment and supply specialist, and his primary responsibilities are to sell and prepare bids for the Respondent's products, and to attend trade shows. He reports directly to Johnston. On occasion he may work in the shop, and on these occasions he does not supervise any employees.

Risberg testified that he had invited several individuals over to his house to play pool. He was aware of the situation at the shop as he had talked with Johnston about the matter "more than once, probably less than fifteen" times, and testified that he thought he would take it upon himself and talk to the employees about the situation as he had belonged to two unions and was somewhat familiar with union matters. While Risberg testified that during these conversations Johnston related his thoughts about how he intended to react to this union situation, Risberg was only able to remember the following: that Johnston told him to keep what he shared confidential, and that that Johnston had contacted his attorney. Johnston did not tell him not to discuss the matter with the employees.

Risberg testified that before entering into the discussion about the Union at his home with Newcombe and, perhaps, Tony Sanchez,[8] he advised them that they could leave at any

[6] The issue in the representation proceeding was whether four individuals are supervisors within the meaning of the Act: Dan Ashley, Bardo Miller, Jay Newcombe, and Brian Johnson. Thereupon, on October 28, the Regional Director issued a Decision and Direction of election, finding that the four individuals were not statutory supervisors and were included within the appropriate bargaining unit. On appeal, this Decision was affirmed by the Board. *MJ Metal Products,* 325 NLRB 240 (1997).

[7] It also appears that Johnston asked for Ashley's set of keys for the same reason.

[8] According to Newcombe, Sanchez was not present during this conversation, although he was present at Risberg's home that evening.

time if they didn't want to hear his comments or did not appreciate what he was telling them.[9] He said that he believed it probably wouldn't be a good thing to have a union and that he knew from conversations with Johnston that there had been an offer to buy the Company from someone out of state. He went on to say that he believed that Johnston would accept this offer as Johnston had always said that he would sell the business "if it stopped being fun." He told Newcombe that it was therefore his personal opinion that Johnston would not want to continue to operate the business as a union shop.

Risberg testified that he spoke with approximately three other employees about the Union, but he could not recall the identity of these individuals. Johnston did not ask him or authorize him to make such statements to any of the employees; nor did Johnston ever tell him that his comments to the employees were acceptable or permissible, or otherwise express satisfaction with Risberg's conduct in speaking with the employees regarding the matter.

A few days later, Johnston held an employee meeting at the shop. The meeting was conducted by Johnston who had also invited his wife and daughter, his parents, and several other individuals, including Britz and Risberg. Johnston began the meeting by thanking his family and Britz for being present, and told the employees about how he had started the business and brought it up from nothing. And he asked the employees to reconsider their efforts to bring in the Union, as he believed that they were all like family and should stick together, and that all the problems could be worked out. Apparently, Johnston was the only one who spoke at the meeting.

On Friday, October 3, the same day as Ashley had called in sick, Newcombe also called in sick. Similarly, as with Ashley, Dykes showed up at his home that morning (Newcombe does not have a phone) and advised him that he needed to get a doctor's note if he was missing work because of illness that day. He was also told that he should come in the next day, Saturday, to make up the time. However, Newcombe's medical problem continued and he was not able to return to work until the following Monday. Newcombe testified that he had never been required to bring in a doctor's excuse on previous occasions when he had missed work because of illness.

Kelly Martin worked for the Respondent from September 17 to 25. He was interviewed and hired by Johnston. Martin testified that during the interview Johnston asked him about his math skills, and Martin said that he was good at math. Johnston asked him if he could read a tape measure accurately, and Martin said yes. Johnston told Martin not to worry about the fact that he didn't have experience in fabricating stainless steel, and said that most of the guys had started with little or no experience and had been trained on the job. According to Martin, nothing was said about a probationary period.

Upon being hired, Johnston brought Martin to Jay Newcombe and told him that Newcombe would be his trainer and would be instructing him on what to do. Thereafter, during his brief 1-week tenure with the Respondent, Martin worked with Newcombe, Tony Sanchez, Bardo Miller, and Leonard Sawyer. Newcombe, according to Martin, had complemented his work. Martin observed that Dykes and Johnston walked through the shop occasionally, but Martin, who would have been able to observe that his work was being inspected or evaluated by them, never noticed that they were stopping to watch or inspect what he was doing; and neither of them said anything to him about his work performance. Martin testified that he was able to read a tape measure and cut materials to a tolerance of within a sixteenth of an inch. He also performed some drilling operations on sheet metal, and during the various occasions when he did this drilling work a total of some three or four drill bits happened to break. However, no one told him that he was drilling incorrectly or breaking too many bits.

Martin testified that after he was hired he received a copy of the Respondent's employee policy manual. The manual, at page 15, contains a clause entitled "Performance Review, in pertinent part as follows:

> Performance appraisals provide a systematic way for each employee to measure his or her development, to discuss it with a supervisor and to know how well he or she is meeting the requirements of the job.
>
> Job performance will be reviewed after the first three months on the job and then on an annual basis. Performance reviews are considered in making pay increases and promotion decisions, but the results of the review will not necessarily ensure to a pay increase or a promotion.
>
> Performance review forms are intended to assist supervisors in recording their assessments of employee performance and in communicating their appraisals to the employee.

Martin attended a union meeting on September 22, and signed a union authorization card on that date. He wore a union hat on hat day—Wednesday, September 24. On previous days Johnston and Dykes had said hello to him. On the day he wore a hat, Johnston did not greet him, and Martin noticed that Johnston was scowling at him while he was working.

On the following day, September 25, Martin was terminated. Martin testified that Dykes came out into the shop where he was working and said it was time for his 7-day evaluation, and that Johnston wanted to speak with him later that day. Martin had never been advised about a 7-day evaluation. He went in to see Johnston at the appointed time, and Johnston told him to sit down. Johnston said he was sorry but that things just didn't seem to be working out as well as Johnston had expected, and that Martin was not picking up the work as fast as Johnston had hoped he would. Martin said that he had done everything he had been told to do, and Johnston said, "you know, you're just not getting into the rhythm of things around here. You can see how busy we are out there." Martin said that he could work faster if that's what Johnston wanted and Johnston said no, "that's why we have a 7-day trial period to see if a guy's going to work out." Martin said that he had not been told anything about a 7-day trial period, and Johnston replied that all the employees are told that when they are hired. Martin said that he was not saying that there wasn't such a trial period, but that he hadn't been told about it. At this point Johnston handed him his final paycheck, and said that he was sorry that things didn't work out, wished him good luck. There was no discussion of the quality of his work.

Shannon Leedall was hired by the Respondent on September 17, and worked until September 25. Leedall testified that on September 17, during his employment interview with Johnston, there was no mention of a probationary period. Upon beginning work he was given an employee policy manual, supra. Leedall attended a union meeting on the evening of September

[9] Newcombe, on rebuttal, denied that Risberg made any such introductory statement.

22, and signed a union authorization card. He wore a union hat on hat day. Leedall testified that both Dykes and Johnston, who were each wearing "MJ Metal" ball caps, saw him wearing the union hat on that day. Further, the Respondent's secretary, Novella Marvel, and the Respondent's salesman, Mark Risman, were also wearing company ball caps. All the shop employees, however, were wearing union ball caps.

Leedall continued to wear his hat on the following day, September 25, and was wearing it when he was told to go to Johnston's office. Johnston said, according to Leedall, that "I wasn't up to standards where he thought I would be within a week's time, and that he was going to have to let me go." During the conversation Johnston's eyes seemed to be mostly fixed on Leedall's union hat.

Leedall testified that he reported to and was being trained by Bart Miller. During his brief tenure no one, not even Miller, commented upon his work as being satisfactory or unsatisfactory. His work was to drill rivet holes and attach metal trim to the product with rivets, after which he would fill the rivets with silicone. He did not observe that his work was watched or inspected by Dykes or Johnston. In the course of his drilling work only one drill bit broke. He had to use a tape measure on occasion, and testified that he had no problem with reading the calibrations on the tape measure.

Brian Johnson worked for the Respondent from January 30, 1989, until November 28, 1997. He was an assistant team leader and his work was primarily to polish and finish the final product. Johnson contacted the Union about the first part of September. He had previously discussed this with some of his co-workers and was given verbal authorization by them to contact the Union. He wore a union hat on hat day, and continued wearing it throughout his employment. He testified as a witness for the Union during the representation hearing on October 7.

Throughout his 8 years of employment Johnson's hours of work had always been from 8 a.m. until 4:30 p.m.[10] And just prior to the union activity herein the Respondent had issued a new work schedule, commencing on September 12, in which Johnson's hours of work continued to remain the same.[11] These hours of work were designed to accommodate his having to care for his son, who in 1990 was diagnosed with a degenerative disease that caused him to be confined to a wheelchair as the disease progressed. Thus, in order to take care of his son, Johnson had to be home from work before 5 p.m., which was the time his wife was scheduled to begin work at her place of employment.

On September 23, the day following the Union's request for recognition, Johnston told Johnson that he was going to have to make certain changes and that Johnson's new hours of work would be from 10 a.m. to 6:30 p.m. Johnston, according to Johnson, did not give a reason for this change. Johnson said that he didn't know if he could work that schedule because it conflicted with his wife's work schedule. Johnston simply replied that this was the way it would be. Johnson said that under the circumstances he might have to find another job, and Johnston replied, "Whatever." Johnson asked when the change would go into effect, and Johnston said it would go into effect the next day.

Later that day Johnson again asked him when his new shift change would start, and Johnston again stated that it would begin the following day. Johnson asked how long the new shift change would be in effect and Johnston said, "Forever." Johnson said that this would be a burden on him and would have an adverse effect on his family, and Johnston replied that his "hands were tied." Johnson asked him to put the shift change in writing, and Johnston refused to do this stating that he was the boss and his verbal order was good enough. Johnson asked him why this was being done to him, and Johnston replied something to the effect, "You guys know why." There was no discussion on this occasion or on any other occasion about complaints by other employees regarding Johnson's schedule.

Thereupon Johnson commenced to work the 10 a.m. to 6:30 p.m. shift. In order to do this it was necessary to make short-term arrangements to have someone else look after his son between the time his wife had to leave for work (although his wife was able to arrange to remain at home until the care giver arrived, this necessitated that she arrive at work late) and he was able to come home from work.

After the change in Johnson's work hours, the shop employees presented Johnston with two documents. One of them, signed by six employees, states:

> We the undersigned employees of MJ Metal Products wish to clarify the issue of Brian Johnson, and the matter of his shift change that took place immediately following the notification of our employer that we wished to be represented by Sheet Metal Workers Local # 207.
>
> I hereby state that at no time did I complain about Brian Johnson leaving the shop at the end of his 4:30 PM shift he has worked at since his employment began at MJ Metal Products.

Another similar document, signed by eight employees, was presented to Johnston thereafter, as follows:

> NOTICE
>
> THIS ACTIVITY IS PROTECTED BY SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT
>
> We the undersigned employees of MJ Metal Products Inc. are acting together through legally protected concerted activities for mutual aid and protection of all employees.
>
> We request that you return Brian Johnson to his regular shift of 8:00 am to 4:30 pm on or before Monday October 20th 1997.
>
> In our opinion, no benefit is realized by changing his shift to 10:00 am to 6:30 pm. To our recollection, no deadline has been missed due to his previous shift, and you are very well aware of his personal situation that makes the 8:00 am to 4:30 pm shift more suitable, in fact, a necessity.
>
> Your agreement with Brian at the beginning of his employment with MJ Metals more than eight years ago, was to allow him to work his regular shift because of the personal needs of his terminally ill child. This was a kind and considerate action on your part, Changing Brians [sic] shift has hurt the child at home, who needs his father.

[10] The Respondent's various weekday shifts were as follows: 6 a.m. until 2 p.m., 8 a.m. until 4:30 p.m., and 10 a.m. until 6:30 p.m.

[11] In addition, three other employees were scheduled to work the 8 a.m. to 4:30 p.m. shift.

On September 29 Johnston presented Johnson with a memo and asked him to sign it. The memo, dated September 29, states: " I Brian Johnson ground thru a liner for Holmes Equip on Fri Sept. 26th." Johnson was reluctant to sign it and Johnston asked if he was refusing to sign. Johnson said he wanted some time to think about it, and Johnston said he didn't have time to wait. Therefor, according to Johnson, he reluctantly signed the document "under duress."

On the same date Johnston brought the same memo to Newcombe, who had repaired the aforementioned liner. Newcombe testified that Johnston wanted him to verify in writing that Johnson had ground through a stainless steel liner and that Newcombe had repaired the liner. At first Newcombe refused to sign it. Newcombe told Johnston that grinding through certain liners was easy to do given the nature of the product, and was a common occurrence, and that the problem might even be attributed to Newcombe who had performed the initial welding process on the liner. Johnston, at this point, became angry and asked Newcombe if the problem with the liner was the fault of both employees; Newcombe replied that this was a possibility. Then Johnston directed him to just sign the paper.

Johnson testified that it was not uncommon to grind through this type of liner, as certain areas of the stainless steel for this particular product, due to its configuration, had been stretched and was very thin in places and "was notorious for blow-throughs and holes." In fact, Johnson testified that since about 1990, when he first began working on this product , about one out of every two liners of this particular type developed holes during the grinding process no matter how careful he was to avoid grinding through the steel; and sometimes the same spot had to be patched and repaired several different times. On previous occasions when he had ground through liners, Johnson had never been required to document this fact; it was merely a routine part of the production process.

On about November 21, Johnston called a meeting in his office and announced to the employees that, regardless of their current shift, their schedules for the week prior to Thanksgiving would be changed to the hours of 8 a.m. until 4:30 p.m., and that they would revert to their prior schedules on the following Monday after Thanksgiving. Thus, Johnson, had he not been discharged, infra, would have thereafter remained on the 10 a.m. to 6:30 p.m. shift.

The representation election was held on November 25. The day following the election, November 26, was Thanksgiving eve. Apparently all employees were scheduled to work only until 4:30 p.m. that day because of the holiday. Johnson testified that at 4:25 p.m. that day[12] Dykes told him, "We need you to stay late tonight," explaining that there was an order that had to be shipped that evening. Johnson said that he could not stay, as he had made a previous appointment in town for 5 p.m. Dykes again asked him to remain, and Johnson stated that while he would not be able to remain until the shipment was on the truck, he would stay as long as he could.

Johnson testified that he did not understand Dykes to be giving him a direct order to remain until the shipment had been loaded on the truck, but rather, as on previous occasions, believed that Dykes was merely requesting him to remain if possible. Johnson testified that on "pretty frequent" prior occasions he had been asked to stay and work overtime in order to complete a particular shipment: On some of these occasions he did not remain at all, and on others he remained for a period of time but left before the work was completed; however, he had never been reprimanded either for refusing to stay or for leaving before the work had been completed.

According to Johnson about seven employees, including Johnson and Newcombe, remained at work after the 4:30 p.m. quitting time that evening. Newcombe, according to Johnson, left shortly thereafter, at about 4:40 p.m. Johnson left at 4:45 p.m., after he had prepared the materials for packing and boxing a large 14-foot stainless steel hood that was one of the items to be shipped. He instructed the crew how to wrap and package the item with the custom-made cardboard packaging he had fabricated that conformed to the shape of the unit. At the time he left the only work to be completed was the wrapping of the unit in plastic sheeting, boxing the unit (including the stapling together of the sections of boxing material) with the cardboard packaging, banding of the unit to the pallet with some type of banding straps, and loading the unit, together with other items, on the truck either manually or with a forklift. This was not specialized work, and everyone in the shop was capable of performing it. All of this work had to be done sequentially and, according to Johnson, could easily have been done by two or three people. In fact, had more people worked on it at one time they would have gotten in each others' way.

On the following workday, Friday, November 28, Johnson clocked in and was summoned to Johnston's office. Johnston's wife was also present. Johnston said that "apparently we have a problem with Wednesday night." Johnson said that to his knowledge there had been no problem, and Johnston said that Johnson did not stay until all the work had been completed and the truck had been loaded. Johnson replied that he had remained as long as he could. Johnston, according to Johnson, stated that "[w]e need to have team players here and people that are going to do what they are asked to do." Johnson repeated that he had stayed as long as he could, but that he had previously scheduled a 5 p.m. appointment in town that evening and had to leave. He asked whether his nearly 9 years of service didn't speak something of his loyalty and of his being a team player. Johnston's wife replied that the only reason he had been employed for 9 years was because he couldn't find another job. Thereupon, Johnston handed him his final paycheck.

Regarding the work of Martin and Leedall, Johnson testified that it was customary for workers to break drill bits and that this was an ongoing daily occurrence caused by having to drill many rivet holes through stainless steel.

Newcombe testified that on Thanksgiving eve there was no scheduled evening shift and everyone was scheduled to leave work at 4:30 p.m. As he was finishing up work for the day, Dykes approached him and said, "[W]e need you to work late" in order to make sure that a shipment goes out. This, according to Newcombe, was couched in the same terminology used by Dykes on prior occasions, and Newcombe understood it to be a request rather than a direct order. Newcombe looked at his watch and noticed that it was 4:23 p.m., and explained to Dykes that he was going to have to leave as his wife regularly dropped off their children at the Respondent's shop at 4:30 p.m. (Newcombe's customary quitting time), on her way to work, so that she could be at work by 5 p.m. Dykes said that the products had to be shipped that evening, and Newcombe said that he would stay as long as he could. Newcombe remained about 15 minutes during which time he finished welding a final part onto

[12] Johnson testified that he looked at his watch at the time of the conversation and that the time was exactly 4:25 p.m.

the hood so that it was completely fabricated; all that remained to be done after he left was to wrap it up, band it and load it on the truck. This, according to Newcombe, was work that could have readily been performed by two or three people, and there were more than enough people remaining to do the work. According to Newcombe, Johnson was still there when Newcombe left the premises that evening, shortly before 4:45 p.m. The truck that was scheduled to pick up the shipments had not yet arrived.

Newcombe testified that all the other orders that were to be loaded on the truck that evening had been setting in the shop, wrapped and/or on pallets, ready to be shipped, for a number of days. Thus, only the one hood was being prepared for shipment that evening. Newcombe testified that there is only one forklift so only one pallet can be loaded on the truck at a time, and, further, that about half the items were not on pallets and were light enough that they could be loaded by hand. He agreed that the more people available to help load the truck the sooner the loading would be completed.

The following workday, Friday, November 28, Dykes told Newcombe that Johnston wanted to speak with him. He entered Johnston's office and Johnston said, "I hear we had a problem Wednesday." Newcombe asked what the problem was, and Johnston explained that Newcombe had refused to work late until the work was completed. Newcombe explained that his wife was waiting outside for him with their children at the end of his regularly scheduled workday, and that the company policy was that children were not permitted in the shop while work was being performed. Johnston replied, "Well, now that this union crap is behind us, things are going to start changing . . . can't go back to the way things were . . . You're going to have to decide what's more important: either my shipment going out on time [or] your wife's going to work." Newcombe said that his wife had to go to work so that they could pay all the bills, and Johnston replied that that was beside the point and that he couldn't have someone working there that he couldn't trust. Finally, Johnston reached into his desk drawer and said that he had to let Newcombe go, and handed him his check.

Newcombe testified that on previous occasions he had left work early after being specifically instructed that he was to remain until some work had been completed, and had never been disciplined or even warned for this in the past. Newcombe testified that upon becoming team leader in about the first part of 1994 he once complained to Johnston about Johnson's inability to work late, and has complained about this a few times thereafter. However since nothing was ever done about the matter he pretty much stopped complaining. The last time he spoke to Johnston about this subject was some 6 months to a year prior to Johnson's discharge.

Newcombe testified that as team leaders he and Bart Miller were assigned to oversee the work of new employees Shannon Leedall and Kelly Martin Newcombe inspected their work, as his job was to make sure that their work looked good before it was shipped to the customer. Newcombe testified that for new employees Leedall and Martin were doing "at least average, if not better." Neither Dykes nor Johnston asked him how either of the two employees were doing, and he was not advised that they were going to be terminated.

Robert Tasler, who was called as a witness herein by the General Counsel, testified that the day prior to his testimony he was summoned by another employee who said that the Respondent's attorney, Bruce Willoughby, wanted to meet with him, apparently in one of the Respondent's offices. During the interview, Willoughby, asked him if he had met with personnel from the labor board and with Union Representative Dale Hill. Tasler said that he had. Willoughby inquired about what he had talked about with them, and Tasler replied that they had asked him some questions about the matter. At no time during the meeting did Willoughby advise Tasler that the interview was voluntary or that Tasler was not required to speak with him; nor did he give Tasler assurances against reprisals in the event Tasler elected not to meet with him or provided him with information adverse to the Respondent.

Tasler testified that he did not complain about Brian Johnson's work schedule; that he has missed work because of illness and has never had to bring in a doctor's excuse; and that he has damaged materials in the course of his work and has never been disciplined or required to document this fact in any way.

Donald Stagg testified that he had never complained to Johnston about Brian Johnson's work schedule, and, in fact, he personally presented one of the petitions to Johnston protesting the change in Johnson's work schedule. Nor has Stagg ever been requested to bring in a doctor's excuse or statement when he has taken time off to visit the doctor or dentist.

Stagg testified that the day before Thanksgiving he heard John Dykes say to a group of employees that everyone needed to stay until a truck had been loaded. He does not know whether Newcombe or Johnson were in that group. Stagg did remain, along with others, until the truck was loaded. According to Stagg there were plenty of people there to load the truck. Johnson, who was generally responsible for the crating of products for shipping, had made the cardboard packaging material for the hood and remained until about 4:45 p.m., during which time he showed some of the employees how the packaging material should be placed around the hood for protection during shipping. Stagg testified that it was very rare for Johnson to work overtime, and he did not do so on a regular basis, but only when his schedule permitted.

Stag also was asked to meet with Attorney Willoughby the day before the hearing. The meeting took place in an office at the Respondent's shop. Stagg testified that he was not advised by Willoughby that the meeting was voluntary; nor was he given assurances against reprisals if he elected not to discuss the matter.

Shop Forman Bardo Miller testified that he worked with employees Shannon Leedall and Kelly Martin to a limited extent and that they seemed to be doing "fine." Miller never complained about Johnson's work schedule. Miller testified that he was asked to meet met with Attorney Willoughby prior to the hearing and was interrogated by him regarding the issues in this proceeding. He was not told that the meeting was voluntary, nor was he given any assurances against reprisal. Miller did remain until the truck was loaded at about 5:15 or 5:30 p.m. He testified that the work of wrapping, boxing, banding and loading the hood on the truck would require, at the most, two employees, as these jobs are sequential. Some employees stayed later than 5:30 p.m. that evening, and started preparing work for the next workday.

Ashley testified that he has never complained to Johnston about Johnson's being unable to work beyond 4:30 p.m.[13] During his 7 years of employment he occasionally ground through

[13] Sanchez testified similarly.

liners and worked on other products that developed defects and had to be repaired. He was never required to document the fact that repairs had to be made on these items.

Novella Marvel is the Respondent's office manager, Marvel, testified that according to the Respondent's bills of lading, there were three shipments to three different customers that went out on the evening of November 26. One shipment contained three units or items, one contained eight, and the third contained only one unit. All were picked up by the same trucking company in the same truck.

Marvel testified that according to the Respondent's time cards, reflecting the employees' clock-out times on November 26, seven employees remained after 4:30 p.m. Both Newcombe and Johnson clocked out at 4:45 p.m. The other five employees clocked out that evening at times between 5 p.m. and 5:45 p.m.: Eric Odom clocked out at 5 p.m.; Don Stagg and Steve Douglas clocked out at 5:30 p.m.; and Bart Miller and Leonard Sawyer clocked out at 5:45 p.m.[14] Marvel testified that Stagg is the employee who signed the invoices for shipping the orders, thus, the orders had been shipped by 5:30 p.m., the time he clocked out.

Marvel testified that one morning she asked several employees about not clocking out on the prior evening. It is part of her job to see that employees clock in and out. Marvel testified that on this occasion she approached Don Stagg and asked him, "Are you sure you didn't leave early to go to the meeting." She knew the employees were having a meeting the evening before, but she was not certain what the meeting was about. Stagg replied that he had not left early and believed that he had clocked out at 6:30 p.m. Marvel did not recollect the date on which this occurred, and testified that it could have occurred on September 23, the day after Business Representative Hill had met with Johnston.

William Lawrence has been employed by the Respondent since September 1997. He testified that he was hired on a Thursday by Johnston, and believes he was hired on the same date as Leedall and Martin were hired. Lawrence testified that during the employment interview by Johnston he was told that Johnston would meet with him again the following Thursday to see how he was doing. Lawrence believed that this constituted a 1-week probationary period. Since then he has had eight or nine evaluation periods after successive weeks. On October 10, 1997, he was asked by Johnston to sign the following document, dated October 3:

> I, Bill Lawrence, understand that I am not guaranteed a full time position until my probation period is over, which shall be on a week to week basis and be determined by the President of MJ Metal Products, Inc.

Production Manger John Dykes has been employed by the Respondent for 8 years. Dykes testified that on November 26, the day before Thanksgiving, he was instructed by Johnston that the hood needed to be shipped that evening in order to be delivered to the customer on the promised date. Dykes testified that, "I went out and told Jay [Newcombe] that we needed to get the truck loaded today, it had to leave today, and that nobody was to leave until the truck was loaded."[15] Newcombe, according to Dykes, replied that his children were being brought to the shop at 4:30 p.m. and that he needed to leave when the kids got there. Dykes then repeated that, "[N]obody leaves until the truck is loaded." At about 4:40 or 4:45 p.m., however, Dykes discovered that Newcombe had left. Dykes was working in Johnson's area at the time, and Johnson, who was still working, told him that all that needed to be done was to wrap the hood and band it down to the pallet, and that he was leaving. Dykes said that nobody was to leave until the truck was loaded. However, Johnson left shortly thereafter, prior to the time the truck arrived. Dykes testified that he remained until the truck was loaded (there were approximately 12 pallets or boxes that were loaded onto the truck) and left the shop for the day at between 5:20 and 5:25 p.m. According to Dykes, the assistance of Johnson and Newcombe was needed to help with the wrapping and banding of the hood and the loading of the truck, and there were no people standing around with nothing to do. When the truck arrived part of the remaining crew was loading the truck while the others were completing the wrapping and banding of the items on the pallet. No unforeseen problems were encountered.

Dykes testified that at 5:20 p.m. he was asked by one of the other team leaders whether he could let some of the crew leave and go home; at this point there were only three or four pallets remaining to be loaded on the truck. Dykes said yes. Thus, Dykes testified that no one was given permission to leave before 5:20 p.m. Dykes further testified, on cross-examination, that since Johnson and Newcombe had been terminated for leaving early he would expect that everyone who left early (prior to 5:20 p.m.) should also have been terminated. However, upon looking at the aforementioned timecards, Dykes testified that, "[W]e might have let [Eric Odom] go earlier because he was not fully experienced in completing that. He stayed until we let him go." Odom's timecard shows that he left sometime before 5 p.m. Dykes does not remember specifically telling Odom he was free to leave, although he stated that he "apparently" told Odom he could leave, Dykes testified that after Johnson and Newcombe left there were five employees remaining to help load the truck, and Dykes felt that Odom, who had been employed by the Respondent for "possibly" a month, didn't have the experience to help. Odom had been there for "possibly a month." The record shows that Odom was promoted to team leader and then to shop foreman, in charge of all the shop employees, in about December or early January 1998.

The next workday, Friday, Johnston asked Dykes what he had told the men in the shop about remaining on the job, and specifically asked what instructions Dykes had given to Newcombe and Johnson. Dykes said that he had told them to remain until the truck was loaded. Thereupon, Johnston said that he wanted to speak with them when they arrived at work that day, and advised Dykes that he was going to let them go for insubordination. Dykes was not present during Johnston's separate discharge meetings with Newcombe and Johnson.

Dykes testified that he had heard that some of the employees were talking about bringing the Union in, and asked several of them, "just as a friend," whether they had attended a union

[14] The timeclock records are based on 7-minute segments, and are rounded off to the nearest quarter hour. Thus, the employees may have an actually clocked out as much as 7 minutes before or after the stated time.

[15] He also gave the same instructions to the other employees and testified that he so instructed the employees, some individually and some in groups, at 4 p.m.

meeting and were intending to go union. He asked Stagg, Miller, and possibly Newcombe these questions. Thereafter, he informed Johnston that he had asked the employees about the Union and whether they intended to go union.

On the Friday that both Newcombe and Ashley called in sick, Dykes was ordered by Johnston to go to their homes, as neither of them had phones, and let them know that they were needed the next day at work, and, further, that if they were not going to be able to make it the next day, Saturday, they would need a doctor's excuse for Friday; however, according to Dykes, they were to bring a doctor's excuse for Friday even if they worked on Saturday.[16] They told him okay. It was unusual for two leadmen to call in sick on the same day. The Respondent's policy manual states that, "Frequent absences will require documentation such as a physicians statements." Newcombe and Ashley, however, had missed only that 1 day.

Johnston, president of the Respondent, testified that he hired Leedall and Martin on September 17. Both of them were primarily working under Bart Miller, although Newcombe also was in charge of their training. Johnston told them not to worry about their lack of experience as they would be trained on the job. Johnston testified that he did not know that Johnson had been the employee who initially contacted the Union, and he was not aware of any union activity until September 22, when he was paid a visit by Business Agent Hill. He recalls informing Hill that he would never be a union shop. It was not until Johnson and Newcombe testified on behalf of the Union at the representation hearing that he became aware that these employees were supporters of the Union.

Johnston testified that he changed Johnson's work schedule from 10 a.m. until 6:30 p.m. shortly after the visit from Hill because, beginning 2 years prior to this time, as the Respondent got busier, Johnston was starting to get complaints from other employees. Throughout this period of time Johnston had always informed Johnson that he needed to remain on the job beyond 4:30 p.m., because the very nature of his work, finishing and polishing the products and loading them on the trucks, was work that was performed during the latter part of the day, and Johnson would rarely work after 4:30 p.m. According to Johnston, "I had been working with him for years and I did finally make the decision that I need him on that [10 a.m. to 6:30 p.m.] shift mainly because of all the other employees stating that they are having to stay to cover for [Johnson]." Thus, his schedule was changed, in part, because of complaints by other employees. Johnston testified that Newcombe, Ashley, and Dykes were the primary individuals who had complained to him about Johnson's schedule, and that they voiced their complaints over a period of several years; Newcombe's latest complaint was about 4 or 5 months prior to the date that Johnson's schedule was changed.

Johnston testified that after his conversation with Hill on September 22, he told Miller that he had been visited by the business agent and wondered what was going on. He told Miller the Respondent would never be a union shop.

Johnston testified that he informed Bill Britz about the union activity, and told him that he was disappointed with the employees and that he had no idea which employees were most active in promoting the Union.

[16] While this instruction to them seems rather incongruous, Dykes insisted that this is what he was instructed to tell them.

According to Johnston, Leedall and Martin were discharged because they did not perform satisfactorily during their 1-week trial period: They could not read a tape measure to the necessary increments of sixteenths and thirty-seconds of an inch; they were slow; and they broke too many drill bits. Also, at the time the Respondent was busy and "needed the extra help crating, packaging, boxing, banding, riveting." Johnston made this decision on his own and did not consult with anyone else in the shop about their work, although he "might have" talked to Dykes about it. He observed their work about 10 percent of the time when he was out in the shop.

Johnston testified that he discussed the union activity with Risberg and that Risberg might have speculated about which employees were promoting the Union. At first Johnston testified that Risberg did not tell him that he, Risberg, was speaking to employees about the Union. When shown his affidavit indicating that in fact he knew that Risberg was going to or had talked with employees about the matter, Johnson stated that his affidavit was correct, but nevertheless was unable to recall the details of their conversations. Further, Johnston testified that he told Risberg not to speak with the employees on Johnston's behalf.

Regarding his conversations with Britz about the matter, Johnston testified that he informed Britz of the union activity, and that whatever Britz did was up to him but "the company is not telling him to say a word to them." After the fact Britz might have informed him of the telephone conversation with Ashley, including the fact that Britz had offered to act as an arbitrator in order to resolve the employees' problems. Johnston told Britz, however, that he did not want to know about any conversations Britz may have had with the employees. Johnston denies telling Britz that Newcombe, Johnson, and Ashley were the union instigators.

Johnston testified that product damage is not an unusual occurrence at the shop, and prior to the instant occasion herein he has never before asked an employee to document having damaged a product. However he documented this incident because he "pretty much" felt that Johnson was sabotaging the work and that it was union-related as, "[I]t was really strange that [Johnson] would all of a sudden grind through a liner, you know, for the first time in I don't know how many years, and all of a sudden he grinds through it." According to Johnston, this was a very unusual circumstance, as Johnson is a very good finisher. Johnston testified that he believed that Johnson had ground through the liner on purpose because, "He probably wasn't too happy with what he was doing or what he was doing . . . this was right in the middle of . . . everybody's upset and arguing and not getting along . . . [about] union stuff," and "It probably wouldn't have happened" had the Union not been on the scene.

Further, Johnson testified that he required a doctor's slip from both Ashley and Newcombe because "it was kind of strange that both [team leaders] were gone at the exact same day."

Finally, Johnston testified that both Newcombe and Johnson were fired for insubordination, namely, disobeying Dykes' direct order that they remain at work that day until the truck was loaded.

C. Analysis and Conclusions

Immediately upon being confronted with the Union's demand for recognition on September 22, the Respondent's managers and supervisors began interrogating employees regarding

their attendance at union meetings and their support for the Union. In this regard I credit the testimony of employees Stagg, Miller, and Tasler. At this point the employees had not yet identified themselves as union adherents. Nor has the Respondent provided any evidence which would warrant the conclusion that such interrogation was not coercive in nature. Accordingly, I find that by such conduct the Respondent has violated Section 8(a)(1) of the Act as alleged.

Further, I find that on September 23, Johnston told Miller that if the employees wanted to go union he would hire journeymen sheet metal workers and that the current employees would all become apprentices, and that his company Johnston would never be union. The first statement constitutes, I find, a specific threat of adverse action by, in effect, demoting employees to apprentice positions, and the second statement constitutes interference with the employees' right to select a union as their collective-bargaining representative, as it tends to emphasize the futility of such activity. By such statements, the Respondent has violated Section 8(a)(1) of the Act.

I find that the abrupt change in Johnson's work schedule on the day following the Union's demand for recognition was imposed by Johnston in retaliation for Johnson's suspected union activity. Thus, the timing of the change directly coincided with the visit from the Union's business agent; Johnson, in order to care for his son, had been permitted to work the earlier shift, from 8 a.m. to 4:30 p.m., for some 8 years even though there may have been isolated, infrequent complaints about his schedule; and some 10 days or so earlier, prior to the union activity, Johnston had prepared a new schedule wherein he changed the schedules of others but not of Johnson, thus showing that he was agreeable to having Johnson continue working the earlier shift as he had done in the past. Accordingly, I conclude that the change in Johnson's schedule is violative of Section 8(a)(1) and (3) of the Act.

Regarding the summary dismissal of recent hires Leedall and Martin after only 1 week of employment, I credit their testimony and find that they were told by Johnston that prior experience was not a problem and that they would be trained on the job. Moreover, I find that they were not told of a 1-week probationary or evaluation period, and that they were able to satisfactorily perform the work they had been given and to and read a tape measure with the requisite accuracy. It is significant that Newcombe and Miller, the two group leaders who had been assigned to train them and oversee their work, were of the opinion that they were performing at least satisfactorily. Finally, their discharge took place 3 days following the Union's request for recognition, and 1 day following hat day, the day that both Leedall and Martin wore union hats to work and made their union adherence known to the Respondent. I do not credit the testimony of Johnston, and find that the various reason he gave for their discharge are not substantiated by the credible record evidence. Indeed, even if they had been told that they were to be evaluated after 1 week, which, I have found, is not the case, there still would have been no reason to discharge them as their work, I find, was not deficient.[17]

I therefore find that the General Counsel has presented a prima facie case in support of the complaint allegation that Martin and Leedall were discharged as a result of their know union adherence, and that the Respondent has not met its burden of proof under *Wright Line*[18] by demonstrating that Leedall and Martin were discharged for legitimate nondiscriminatory reasons. Accordingly, I conclude that by discharging Leedall and Martin the Respondent has violated Section 8(a)(1) and (3) of the Act.

I conclude that Johnston changed his mind about permitting Sanchez to leave work an hour early on September 25 to attend the La Maze class because of Sanchez' union activity. Thus, prior to the union activity Johnston had given permission to Sanchez to take the time off, and it was on hat day, while Sanchez was wearing his union hat, that Johnston reneged on this commitment, telling Sanchez that everybody was on a set schedule because that's the way everybody wanted it. Insofar as the record shows, the only intervening occurrence between the time permission was granted and the time it was retracted was the advent of the Union in general and the identification of Sanchez as a union adherent in particular. The Respondent has not demonstrated that Johnston's retracting of his prior agreement was for legitimate business considerations. Accordingly, by such conduct I find that the Respondent has violated Section 8(a)(1) and (3) of the Act.

I credit the testimony of Johnson and Newcombe and find that grinding through liners of the type involved herein was an unavoidable occurrence that happened with some regularity due to the nature of the manufacturing process, and that the incident on September 29 was no different that many other such instances. Thus, Johnson had ground through such liners on numerous occasions in the past, prior to the union activity herein, and had never been required to document such occurrences. Indeed, Johnston testified that he became suspicious of Johnson after his union adherence became evident, and was concerned that Johnson, apparently on behalf of the Union, might be engaged in some sort of sabotage. There is no evidence that Johnston's alleged suspicions were justified. I find that the record evidence demonstrates that requiring Newcombe and Johnson to document the foregoing incident was motivated by their known union adherence. Accordingly, I conclude that by such conduct the Respondent has violated Section 8(a)(1) of the Act.

Similarly, it is clear that the requirement that Newcombe and Ashley bring doctor's slips for their absence from work on October 3, was occasioned by their union activity. Both of them were known union adherents as they wore union hats on hat day, both had missed work on prior occasions and had never been required to submit a doctor's note, and the Respondent's express policy in its policy manual was to require such documentation only for "frequent absences." Further, Dykes told Ashley that Johnston, by requiring a doctor's slip, was going by a "new book," apparently meaning a new set of rules, and the Respondent has not demonstrated any legitimate rationale or purpose for instituting a new set of rules at that particular time. While the Respondent takes the position that the doctor's slip was required in this instance because it was highly unusual for two team leaders to be absent on the same day, there has been no showing that their absences were bogus or occasioned by anything other than legitimate illness. Moreover, as with

[17] Accordingly, it appears unnecessary to make a credibility resolution regarding the testimony of employee William Lawrence to the effect that he was advised by Johnston of a 1-week evaluation period upon being hired.

[18] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S.989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

Respondent's documentation of Johnson's work on the occasion when he ground through a liner, it appears that Johnston was operating under the assumption that anything he considered to be "unusual" must necessarily be union-related and that Newcombe and Ashley, by their absences, were perhaps engaged in some sort of conspiracy to affect the Respondent's production. Clearly, this was not the case. Accordingly, I find that by requiring the employees to sign a doctor's slip under these circumstances the Respondent has violated Section 8(a)(1) of the Act.

The discharge of Newcombe and Johnson on November 28, 3 days after the representation election, allegedly for insubordination in failing to remain after their scheduled working hours until a truck had been loaded, follows the same pattern as the other instances of discriminatory conduct found herein. Thus, Newcombe and Johnson were known to be active union adherents, and both testified on behalf of the Union during the representation hearing on October 7. I credit their testimony herein and find that both had refused to work late on previous occasions and, prior to the advent of the Union, had suffered no adverse repercussions for such refusals. Both were long-term employees of the Respondent with responsible positions and there is no evidence that their work records were other than highly satisfactory. Moreover, each of them had a legitimate excuse for leaving work early as, believing they were to work only until 4:30 p.m. that day, they had made prior arrangements; nor were they advised until shortly before quitting time that they were to remain at work. Indeed, even then they attempted to accommodate the Respondent by remaining as long as possible.

Further, the employees remaining thereafter had no problems with the work that was to be done, and it appears that there were more than enough people to complete the job. Indeed, Dykes testified that he let two of these employees leave early, before the truck had been loaded. Finally, one employee, Odom, left early at or prior to 5 p.m., without Dykes' permission, and that employee was not discharged or, insofar as the record shows, even disciplined. The Respondent's rationale for such disparate treatment, namely, that Odom was a relatively new employee and was not experienced in wrapping, packaging, and loading, seems to be a rather feeble contention and is not substantiated by the record. Thus, as the record evidence clearly shows, the processes of wrapping, packaging, and loading are simplistic manual tasks that take no particular skill and experience; and if Odom should have had a problem with such work there were more experienced workers around who could advise him, for example, of the proper methodology for carrying a box onto a truck.

Finally, during Johnston's discharge conversation with Newcombe, Johnston told him that, "Well, now that this union crap is behind us, things are going to start changing . . . I can't go back to the way things were . . . . You're going to have to decide what's more important: either my shipment going out on time [or] your wife's going to work." Thus, Johnston was, in effect, telling Newcombe that the "union crap" was the catalyst that mandated a change in policy and precluded Johnston's returning to the preunion policy of permitting employees to refuse to work overtime. Clearly, this implies that the discharge of Newcombe and Johnson would not have happened absent the intervening union campaign.

On the basis of the foregoing, I find that the General Counsel has presented a prima facie case indicating that the Respondent's discharge of Newcombe and Johnson was motivated by their union activity, and that the Respondent has not satisfied its requisite burden of proof under *Wright Line,* supra, by providing persuasive contrary evidence that Newcombe and Johnson were discharged for valid business considerations. Accordingly, I find that the discharges of Newcombe and Johnson are violative of Section 8(a)(1) and (3) of the Act, as alleged.

The telephone conversation between Britz and Ashley took place after hat day, apparently in late September. I credit the account given by Ashley, who appeared to have a vivid recollection of the conversation, and I do not credit the testimony of Britz insofar as it conflicts with Ashley's recollection.

While both Britz and Johnston denied that that the two of them contrived to have Britz phone Ashley and/or Newcombe, I find that under all the circumstances Ashley could have reasonably believed that Britz was speaking for and acting on behalf of the Respondent. Thus Britz , a primary customer and admitted confidante of Johnson's, offered Ashley his services as an arbitrator of the issues dividing the Respondent and the employees, and related to Ashley that Johnston had told him that Johnson, Newcombe, and Ashley were the leaders of the union movement. Thereafter, Britz admittedly made Johnston aware of the conversation. Further, in early October, Johnston, who at the time was aware of Britz' contact with Ashley, introduced Britz and thanked him for attending the employee meeting during which Johnston attempted to persuade the employees that the Union was not in their best interests. At no time did Johnston make an attempt to disavow Britz' remarks or advise Ashley or the other employees that he had not authorized Britz to speak for the Respondent. Accordingly, I conclude that Britz' remarks may be attributed to the Respondent. *Technodent Corp.*, 294 NLRB 924 (1989); *Allegheny Aggregates, Inc.,* 311 NLRB 1165, 1166 (1993).

I further find that certain of Britz' remarks, attributable to the Respondent, are violative of Section 8(a)(1) of the Act. Thus, the identification of the three employees as leaders of the union movement, under the circumstances, is inherently coercive in nature. Moreover, Britz' request to act as an arbitrator may be reasonably understood as an implied promise to resolve the employees' problems to their satisfaction without the intervention of the Union.

I credit the testimony of Newcombe and find that under all the circumstances Newcombe could have reasonably believed that Risberg, during the conversation at his home, was speaking for and acting on behalf of the Respondent. During the conversation Risberg attempted to impress upon Newcombe that unionization would result in the sale and closure of the Respondent's business in Casper. To emphasize this point, Risberg produced certain bank documents showing that the Respondent had sometimes overdrawn its bank account, and said that he had obtained them from Johnston's desk. It is significant that the Respondent did not proffer any evidence tending to show that these documents, clearly confidential in nature, were surreptitiously removed or were not voluntarily provided to Risberg for the express purpose of causing Newcombe or other employees to believe the scenario presented by Risberg. In the absence of such evidence, I do not credit the testimony of Risberg that he was acting upon his own volition and had not been authorized and solicited by Johnston to approach the employees and, in effect, threaten them with the closure of the Respondent's shop in the event they did not discontinue their advocacy of the Union. Accordingly, I find that based on the record as a

whole, Risberg's remarks may be attributed to the Respondent, and that by such statements the Respondent has violated Section 8(a)(1) of the Act as alleged. See *Technodent Corp.,* supra*; Allegheny Aggregates, Inc.,* supra.

It is alleged in the complaint that the foregoing unfair labor practices are so serious and substantial in character as to warrant the issuance of a bargaining order, and that at all times all times since September 22, the Union, having obtained authorization cards from 13 of approximately 15 unit employees, has been and is the exclusive collective-bargaining representative of the Respondent's employees. It is further alleged that since September 22, the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, and that since on or about November 26, the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally changing its overtime policy without first giving notice to the Union and providing the Union with an opportunity to bargain over such change.

I agree that the unfair labor practices found herein, beginning simultaneously with the Union's request for recognition, are sufficiently serious and pervasive to warrant a remedial bargaining order. Such unfair labor practices include threats that the Respondent would sell and shut down its Casper operations and the unlawful discharge of four employees comprising over 20 percent of the employees in the bargaining unit. Moreover, the Respondent's unlawful treatment of Johnson, by knowingly changing his work schedule in a manner designed to interfere with his ability to provide care for his seriously ill son, after accommodating Johnson in this regard for many years, is particularly egregious and sends a clear message to the employees that serious adverse repercussions will follow their selection of the Union as their bargaining agent. Such violations, I find, are not likely to be remedied by the Boards traditional remedies short of a bargaining order, as they are likely to have a long term coercive impact on the employees' freedom of choice under the Act. *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969); *Carter & Sons Freightways, Inc.,* 325 NLRB 433 (1998); *Garney Morris, Inc.,* 313 NLRB 101 (1993). Accordingly, I shall recommend a remedial bargaining order herein, in the event the determinative challenged ballot of employee Leedall has not been cast for the Union.[19]

Finally, I credit the unrebutted testimony of various employees who stated that upon being required to be interviewed by the Respondent's attorney during his preparation for this proceeding the employees were not given the appropriate safeguards consistent with the requirements of *Johnnie's Poultry Co.,* 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1979). By such conduct the Respondent has violated Section 8(a)(1) of the Act.

D. The Representation Proceeding

As noted above, the ballot of Shannon Leedall, who had been discharged by the Respondent prior to the representation election herein, was challenged by the Respondent . The tally of ballots issued after the election shows that six votes were cast for and six votes were cast against the Union, and that the ballot of Leedall is determinative of the results of the election. Having found that Leedall was discriminatorily discharged prior to the election, it follows that he was an eligible unit employee at the time of the election. I therefore recommend that Leedall's ballot be opened and counted and that an appropriate certification be issued.

In the event that Leedall's ballot has not been case in favor of the Union and, further, if the Board refrains from imposing upon the Respondent the recommended bargaining order found herein to be necessary under the circumstances, then I recommend that the election previously conducted herein be set aside and a second election be conducted, as the election objections, which are identical to the unfair labor practices found herein to have occurred prior to the election, are clearly meritorious.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(3) and (1) of the Act by the conduct found unlawful herein.
4. The Respondent's violations of the Act mandate a bargaining order remedy under *Gissel Packing Co.,* supra.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Further, the Respondent shall be required to offer employees Jay Newcombe, Brian Johnson, Shannon Leedall, and Kelly Martin immediate and full reinstatement to their former positions of employment and make them whole for any loss of wages and other benefits they may have suffered by reason of Respondent's discrimination against them in the manner prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent should, under the circumstances herein, be required to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in an appropriate bargaining unit, the remedy herein shall include a provisional bargaining order that shall become effective in the event a majority of ballots in the representation matter herein has not been cast for the Union.

In addition, the Respondent shall be required to post an appropriate notice, attached as an "Appendix."[20]

[Recommended Order omitted from publication.]

[19] I do not find that the Respondent has made certain alleged unilateral changes in violation of the Act. Thus, the deviations by the Respondent in any of its established policies appear to be isolated instances designed to retaliate against individual employees, and are remedied herein.

[20] The notice should be modified accordingly in the event the Union prevails in the election and the bargaining order is therefore no longer necessary.